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United States of America

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

SHERRY RENEE KINCADE,

Defendant.

CASE NO. 1:22-CR-00001-DAD-BAM

STIPULATION REGARDING EXCLUDABLE
TIME PERIODS UNDER SPEEDY TRIAL ACT;
AND ORDER

DATE: February 23, 2022
TIME: 2:00 p.m.
COURT: Duty Court

This case is set for status conference on February 23, 2022. On May 13, 2020, this Court issued General Order 618, which suspended all jury trials in the Eastern District of California until further notice, and allows district judges to continue all criminal matters. Under General Order 618, a judge “may exercise his or her authority to continue matters, excluding time under the Speedy Trial Act with reference to the court’s prior General Order 611 issued on March 17, 2020 . . . with additional findings to support the exclusion in the Judge’s discretion.” General Order 618, ¶ 6 (E.D. Cal. May 13, 2020). In addition, any judge “may order case-by-case exceptions” to General Order 618’s provisions “at the discretion of that Judge or upon the request of counsel, after consultation with counsel and the Clerk of the Court to the extent such an order will impact court staff and operations.” General Order 618, ¶ 7 (E.D. Cal. May 13, 2020). This and other General Orders were entered to address public health concerns related to COVID-19 (for example, General Order 614—recently extended by General Order 640).

Although the General Orders address the district-wide health concern, the Supreme Court has emphasized that the Speedy Trial Act’s end-of-justice provision “counteract[s] substantive openendedness with procedural strictness,” “demand[ing] on-the-record findings” in a particular case. *Zedner v. United States*, 547 U.S. 489, 509 (2006). “[W]ithout on-the-record findings, there can be no exclusion under” § 3161(h)(7)(A). *Id.* at 507. Moreover, any such failure cannot be harmless. *Id.* at 509; *see also United States v. Ramirez-Cortez*, 213 F.3d 1149, 1153 (9th Cir. 2000) (explaining that a judge ordering an ends-of-justice continuance must set forth explicit findings on the record “either orally or in writing”).

Based on the plain text of the Speedy Trial Act—which *Zedner* emphasizes as both mandatory and inexcusable—General Orders 611, 612, 617, and 618 require specific supplementation. Ends-of-justice continuances are excludable only if “the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial.” 18 U.S.C. § 3161(h)(7)(A). Moreover, no such period is excludable unless “the court sets forth, in the record of the case, either orally or in writing, its reason or finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.” *Id.*

The General Orders exclude delay in the “ends of justice.” 18 U.S.C. § 3161(h)(7) (Local Code T4). Although the Speedy Trial Act does not directly address continuances stemming from pandemics, natural disasters, or other emergencies, this Court has discretion to order a continuance in such circumstances. For example, the Ninth Circuit affirmed a two-week ends-of-justice continuance following Mt. St. Helens’ eruption. *Furlow v. United States*, 644 F.2d 764 (9th Cir. 1981). The court recognized that the eruption created “appreciable difficulty” for the trial to proceed. *Id.* at 767-69; *see also United States v. Correa*, 182 F. Supp. 326, 329 (S.D.N.Y. 2001) (citing *Furlow* to exclude time following the September 11, 2001 terrorist attacks and the resultant public emergency).

The coronavirus poses a similar, albeit more enduring, “appreciable difficulty” to the prompt proceedings mandated by the statutory rules. Recently, the Ninth Circuit enumerated a “non-exhaustive” list of seven factors it found to be “relevant” in considering ends-of-justice Speedy Trial Act continuances “in the context of the COVID-19 pandemic.” *United States v. Olsen*, --- F.3d ---, 2021 WL

1589359 at *7 (9th Cir. Apr. 23, 2021). That non-exhaustive list includes: (1) whether a defendant is detained pending trial; (2) how long a defendant has been detained; (3) whether a defendant has invoked speedy trial rights since the case’s inception; (4) whether a defendant, if detained, belongs to a population that is particularly susceptible to complications if infected with the virus; (5) the seriousness of the charges a defendant faces, and in particular whether the defendant is accused of violent crimes; (6) whether there is a reason to suspect recidivism if the charges against the defendant are dismissed; and (7) whether the district court has the ability to safely conduct a trial. *Id.*

In light of the foregoing, this Court should consider the following case-specific facts in finding excludable delay appropriate in this particular case under the ends-of-justice exception, § 3161(h)(7) (Local Code T4). If continued, this Court should designate a new date for the status conference. *United States v. Lewis*, 611 F.3d 1172, 1176 (9th Cir. 2010) (noting any pretrial continuance must be “specifically limited in time”).

STIPULATION

Plaintiff United States of America, by and through its counsel of record, and defendant, by and through defendant’s counsel of record, hereby stipulate as follows:

1. By previous order, this matter was set for status conference on February 23, 2022.
2. By this stipulation, defendant now moves to continue the status conference until August 24, 2022, and to exclude time between February 23, 2022, and August 24, 2022, under 18 U.S.C. § 3161(h)(1)(E) and (7)(A), B(iv) [Local Code T4].
3. The parties agree and stipulate, and request that the Court find the following:
 - a) This matter concerns an out-of-district indictment from the Eastern District of Virginia. The parties agreed to and have completed a Rule 20 transfer of this matter from the Eastern District of Virginia to the Eastern District of California. Doc. 17.
 - b) Counsel for the defendant will be on extended medical leave until August 2022.
 - c) Counsel for defendant desires additional time to consult with her client, review the current charges, and to discuss a potential plea agreement in this matter.
 - d) Counsel for defendant believes that failure to grant the above-requested continuance would deny him/her the reasonable time necessary for effective preparation, taking

1 into account the exercise of due diligence.

2 e) The government does not object to the continuance.

3 f) In addition to the public health concerns cited by the General Orders and
4 presented by the evolving COVID-19 pandemic, an ends-of-justice delay is particularly apt in
5 this case because the defendant is not currently detained and has not invoked her speedy trial
6 rights. Additionally, any trial in this matter will require witnesses to travel from out of state to
7 the Eastern District of California.

8 g) Based on the above-stated findings, the ends of justice served by continuing the
9 case as requested outweigh the interest of the public and the defendant in a trial within the
10 original date prescribed by the Speedy Trial Act.

11 h) For the purpose of computing time under the Speedy Trial Act, 18 U.S.C. § 3161,
12 et seq., within which trial must commence, the time period of February 23, 2022 to August 24,
13 2022, inclusive, is deemed excludable pursuant to 18 U.S.C. § 3161(h)(1)(E) and (7)(A), B(iv)
14 [Local Code T4] because it results from a continuance granted by the Court at defendant's
15 request on the basis of the Court's finding that the ends of justice served by taking such action
16 outweigh the best interest of the public and the defendant in a speedy trial.

17 4. Nothing in this stipulation and order shall preclude a finding that other provisions of the
18 Speedy Trial Act dictate that additional time periods are excludable from the period within which a trial
19 must commence.

20 IT IS SO STIPULATED.

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22 Dated: February 14, 2022

PHILLIP A. TALBERT
United States Attorney

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25 /s/ JESSICA A. MASSEY
JESSICA A. MASSEY
Assistant United States Attorney
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1 Dated: February 14, 2022

/s/ MEGHAN MCLOUGHLIN
MEGHAN MCLOUGHLIN
Counsel for Defendant
SHERRY RENEE KINCADE

5 **ORDER**

6 IT IS SO ORDERED that the status conference is continued from February 23, 2022, to **August**
7 **24, 2022, at 1:00 p.m. before Magistrate Judge Barbara A. McAuliffe.** Time is excluded pursuant to
8 18 U.S.C. § 3161(h)(7)(A), B(iv).

9
10 IT IS SO ORDERED.

11 Dated: **February 15, 2022**

/s/ *Barbara A. McAuliffe*
UNITED STATES MAGISTRATE JUDGE